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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 378

WATERMAN STEAMSHIP CORPORATION,

Petitioner,

—against—

JOSEPH SKIBINSKI,

Respondent.

MOTION FOR LEAVE TO FILE THE ACCOMPANYING BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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American Merchant Marine Institute, Inc., a non-profit membership corporation representing 41 steamship companies which operate approximately 57% of the gross registered tonnage of the active privately-owned American flag merchant fleet, respectfully moves for leave to file the accompanying *amicus curiae* brief, to which petitioner has consented and respondent has declined to consent.

The Institute's interest arises from growing necessity for prompt determination by the Court of the frequently recurrent question of judge-made Federal law presented by the stipulated facts of this case. Is the shipowner liable on grounds of unseaworthiness for damage caused by negli-

gence of the independent stevedoring contractor? This question has engendered irreconcilable opinions and sharp dissents between and within those Circuits adjudicating the bulk of marine litigation, with consequent uncertainty, controversy, expense, and irreparable loss which are of mounting concern to the marine industry and those dependent upon its services and employment.

Since neither petitioner nor respondent has emphasized or can directly confirm the immediate importance to the industry of a resolution of the question presented, the Institute believes that the accompanying *amicus curiae* brief may convincingly bring this to the Court's attention. Resolution of the question will terminate this suit; facilitate prompt disposition of many pending suits raising the identical question; reduce the need for commencing an increasing number of such suits; and assist a vital industry to maintain its stability.

American Merchant Marine Institute, Inc. therefore respectfully prays that its motion be granted.

Respectfully submitted,

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The petition adequately cites the opinions below and sets forth the jurisdictional requisites.

Question Presented

Is the shipowner liable on grounds of unseaworthiness for damage caused by negligence of the independent stevedoring contractor?

Statement

"The material facts are not in dispute" (A 27).* It was stipulated (39-41a)* and the District Court found (A 30,

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* Prefix "A" references are to pages of the appendix to the petition for certiorari. Suffix "a" references are to pages of appellants' appendix in the Court of Appeals.

39) that instead of lowering the ladder with an immediately available close mouth shackle intended for that purpose and which would have prevented the ladder from falling, the stevedore's employees used a seaworthy open mouth hook which was not intended for that purpose. The District Court found that "use of the open mouth cargo hook and the falling ladder were proximate causes of plaintiff's injury" (A 16, 31) and "held that the injury was caused by the ship's unseaworthiness" (A 14).

The dissenting Circuit Judge observed that "the lifting gear the ship turned over to the stevedore was entirely sound; every piece of it was staunch, solid and suited to its intended use. Plaintiff's injury resulted solely from the negligent manner in which the stevedores employed it" (A 20), which the District Court held was "conduct by the stevedore tantamount to 'criminal neglect'" (A 39).

Argument

This case is one of "increasing numbers" (A 20) which, like *Radovich* v. *Cunard Steamship Co., Ltd.*, —— F. 2d —— (2 Cir. 1966),* attest "the difficulty of applying the act—condition (or operational negligence—unseaworthiness) dichotomy" (A 58). Was the stevedore's improper use of the seaworthy hook in place of the available shackle "an incident in a continuous course of operation", *Grillea* v. *United States*, 232 F. 2d 919, 922 (2 Cir. 1956), for which the shipowner is not liable, or did it create an unseaworthy condition for which the shipowner is liable? The "Supreme Court has not yet spoken on the precise question as to whether a stevedore's negligence in the

* The opinion, not yet officially reported, is printed in appendix E to the petition (A 53-62).

use of ship's seaworthy equipment makes the ship unseaworthy", *Ferrante* v. *Swedish American Lines,* 331 F. 2d 571, 578 (3 Cir. 1964), dismissed 379 U. S. 801; *accord,* the dissenting opinions below (A 23) and in *Radovich* v. *Cunard Steamship Co., Ltd., supra* (A 62). The Circuit Court decisions are in despairing conflict.

Ferrante v. *Swedish American Lines, supra,* which holds "that a stevedore's negligent or unsafe use of a ship's seaworthy equipment makes the ship unseaworthy", 331 F. 2d, p. 577, cites First, Second, a prior Third, and Ninth Circuit decisions to the contrary, 331 F. 2d, pp. 576-577, including *Arena* v. *Luckenbach Steamship Co.,* 279 F. 2d 186, 189 (1 Cir. 1960), cert. denied 364 U. S. 895, which rejected the argument "that because a stevedore may have made negligent use, or negligent choice, of equipment in which it is bringing freight aboard, the ship becomes unseaworthy", and *Billeci* v. *United States,* 298 F. 2d 703, 705-706 (9 Cir. 1962), which held that "the shipowner's warranty of seaworthiness does not extend to a negligent use by longshoremen of seaworthy appliances."

The most acute controversy exists between and within the Second and Third Circuits, where more than 50% of all maritime cases are litigated.* *Radovich* v. *Cunard Steamship Co., Ltd., supra* (A 56), concedes that the "difference between operational negligence and unseaworthiness has been questioned in this circuit [citing *Reid* v. *Quebec Paper Sales & Transportation Co.,* 340 F. 2d 34 (2 Cir. 1965)] and is not accepted in some other jurisdictions" [citing *Ferrante* v. *Swedish American Lines, supra;* and *contra, Billeci* v. *United States, supra*]. The dissenters in *Thompson* v. *Calmar Steamship Corp.,* 331 F. 2d 657,

* *En Banc Hearings,* 40 N. Y. U. Law Rev. 563, 588 (May 1965).

663 (3 Cir. 1964), cert. denied 379 U. S. 913, called the majority opinion "ridiculous" and "incongru[ous]" and accurately foresaw that "the bar and the maritime community will find that our ruling leaves confused and doubtful the question of the ship's liability in many situations, in which it heretofore had seemed clear that no liability existed." In the Second Circuit, the fact that "various panels of the court have been in disagreement on this important issue", *Puddu* v. *Royal Netherlands Steamship Co.*, 303 F. 2d 752, 754 (2 Cir. 1962), cert. denied 371 U. S. 840, virtually guarantees that, as in the opinion below and in *Radovich* v. *Cunard Steamship Co., Ltd., supra,* shifting majorities will make "trivial, meaningless and confusing distinctions" (A 61) between earlier holdings (A 18-19, 57-58) which temporary minorities find indistinguishable (A 22, 61), causing the latter to accuse the former of "casuistry" (A 22), "judicial legerdemain" (A 23), "skillful rhetoric" (A 61), and use of "words and phrases that are like beads of quicksilver" (A 61). Yet, as in this case (A 52) and in *Thompson* v. *Calmar Steamship Corp., supra,* both Circuits have refused to grant *en banc* rehearings which might at least have resulted in a majority decision which future panels would be bound to follow, however grudgingly.

The "metaphysical inquiry required by that doctrine of determining whether [the] act of negligence had 'terminated' or 'come to rest' " so as to perceive a "distinction emerg[ing] between an accident caused by an act of negligence, and one caused by an unsafe condition of the work place, which in turn may, of course, be due to an act of negligence", *Reid* v. *Quebec Paper Sales & Transportation Co., supra,* 340 F. 2d, p. 37, has produced the "far from satisfactory" rubric that the "conduct or process by which the fitness is changed to unfitness is not then to be classi-

fied as itself constituting unseaworthiness", *Puddu* v. *Royal Netherlands Steamship Co., supra,* 303 F. 2d, p. 757. In an effort "to scuttle a doctrine which requires judges to make distasteful hair-splitting distinctions unrelated to any intelligible concepts of right or wrong" (A 22), some Second Circuit panels have shifted the onus to the jury as trier of the facts. Thus, in *Norfleet* v. *Isthmian Lines, Inc.,* 355 F. 2d 359, 363 (2 Cir. 1966), after stating that the "fact that the unseaworthy condition was created by the negligence of a fellow longshoreman does not absolve the shipowner from liability if it is shown that the 'active negligence' had come to rest and the resulting 'condition' was in existence", the Court remanded with instructions to charge the jury "that even if an unseaworthy condition had been created by a negligent act of a fellow longshoreman, the shipowner may still be liable" but "if the injury resulted from negligent mishandling of a seaworthy appurtenance and if the injury occurred before any unseaworthy condition resulted, then the shipowner would not be liable in an action based on breach of the warranty of seaworthiness", 355 F. 2d, pp. 363-364.

The fallacy of abdicating to the fact finder is at least twofold. Juries are as incapable as judges of making distinctions when "logical coordinates for fixing a point, such as the time during which a particular condition continues to exist, are entirely lacking", *Puddu* v. *Royal Netherlands Steamship Co., supra,* 303 F. 2d, p. 757. And, where the essential facts are stipulated in a non-jury case, as here, the Second Circuit rule based upon objectives of uniformity and consistency which are the very essence and purpose of law, *Mamiye Bros.* v. *Barber Steamship Lines, Inc.,* 360 F. 2d 774, 776-777 (2 Cir. 1966), is that the trial judge's determination of negligence or unseaworthiness is

a conclusion of law. *Romero* v. *Garcia & Diaz, Inc.*, 286 F. 2d 347, 355 (2 Cir. 1961), cert. denied 365 U. S. 869; *Van Carpals* v. *The S.S. American Harvester*, 297 F. 2d 9, 12 (2 Cir. 1962), cert. denied 369 U. S. 865.

As noted in the dissenting opinions below (A 22-23) and in *Radovich* v. *Cunard Steamship Co., Ltd., supra* (A 61), some Circuit Courts have not been "unmindful", *Scott* v. *Isbrandtsen Co.*, 327 F. 2d 113, 127 (4 Cir. 1964), of the shipowner's right to recover indemnity from the stevedore under the doctrine of *Ryan Stevedoring Co.* v. *Pan-Atlantic Corp.*, 350 U. S. 124 (1956), and have sought to justify the imposition of liability on the shipowner for the stevedore's negligence by rationalizing that such "liability will rest on [the shipowner] only for a moment and then will be transferred to the stevedoring contractor" (A 22). The insidious notion that "the story will have a happy ending for the ship" (A 22) apparently stems from the invalid assumption that frustrating the legislative intent of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §905, will hurt only the stevedore and make no "economic difference", *Reed* v. *The Yaka*, 373 U. S. 410, 414 (1963), to the shipowner. This is not so.

The American merchant marine is under such stringent economic pressure that none of its components can absorb the additional costs, either directly or indirectly by payment for increased insurance, of superimposed liability for damages caused by another. The stevedore must and does pass the cost of its third-party liability back to the shipowner by increasing the stevedoring rates to cover the additional exposure. The shipowner, in turn, must and does pass along this additional stevedoring charge to its customers, American shippers and consignees, thereby placing further economic burden upon our vital foreign

and domestic ocean commerce. The present disadvantageous state of the privately-owned American flag merchant marine is very largely attributable to recent judge-made Federal law premised on mistaken notions of "economic difference".

As dealt with by various Circuit Courts, the question presented necessitates meaningless hair-line distinctions between negligence which is still "active" and negligence which has "terminated" and become an unseaworthy "condition". The question calls for the same exercise of "sound judicial administration" which moved the Court to declare inappropriate the similar "application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence", *Weyerhaeuser S.S. Co.* v. *Nacirema Co.*, 355 U. S. 563, 569 (1958).

Conclusion

The petition should be granted.

Respectfully submitted,

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